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ФОРМУВАННЯ АНТИКРИЗОВОЇ КОНЦЕПЦІЇ ПІДВИЩЕННЯ СТРАТЕГІЧНОЇ СТІЙКОСТІ УКРЗАЛІЗНИЦІ

Анотація. Розкрито сутність існуючих моделей реформування на залізничному транспорті. Розроблено Програму управління антикризовими змінами Укрзалізниці. Виокремлено нові елементи корпоративної культури Укрзалізниці Запропоновано заходи для формування сприятливих умов для ведення господарської діяльності залізниць, створення сприятливого інформаційного фону залізничного транспорту, активізацію інвестиційного та інноваційного процесу. Виокремлено певні правила для управління фінансовими ризиками, а саме:

Існує ряд певних правил, яких необхідно дотримуватись, якщо організація бажає зміцнити ефективність управління фінансовими ризиками: 1) Відповідальність вищого керівництва підприємства; 2) Наявність загальної політичної лінії та інфраструктури ризик-менеджменту. різних ланцюгів управління, повинна бути достовірною та оперативною; 3) Інтеграція ризик-менеджменту; 4) Відповідальність центрів відповідальності; 5) Оцінка та ранжування рівня ризику; 6) Незалежна експертиза; 7) Планування для непередбачених ситуацій.

Розкрито сутність методів корупційної програми Укрзалізниці. Підкреслено, що важливим елементом будь-якої корпоративної культури є такі поняття як: мотивація, відданість співробітників компанії. Для Укрзалізниці особливо актуально як виховання власних кадрів, а й формування з вже існуючої бази співробітників лояльних їй і відданих членів компанії, які відчувають свою причетність до її діяльності, її розвитку.

Запропоновано напрями формування позитивного образу в очах широкого споживача. Окреслено напрямки створення в національних компаніях у різних галузях (не тільки для транспортних підприємств) стійких стимулів до пошуку нових ніш та прагнення до виходу на лідируючі позиції як на внутрішньому, так і на світовому ринку. Надано характеристику методів управління антикризовими змінами.

Ключові слова: *Укрзалізниця, антикризовий менеджмент, реформування залізниць, стратегії розвитку.*

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PECULIARITIES OF PROVING GUILT OF A TAX VIOLATION COMMITMENT

Abstract. The article highlights the problems of defining the concept of "guilt" in a tax offense, which was introduced relatively recently, and therefore there is no established practice of law enforcement in this area. The author raises the issue of the need to be held liable for various types of liability for committing a tax offense in a certain order, for example, bringing to administrative responsibility must precede bringing to financial responsibility.

The author also draws attention to the problem of the relationship between guilt and responsibility of officials of the legal entity and the legal entity itself and suggests solutions by introducing certain legislative changes. Attention is also drawn to the need to apply different standards of proof to certain types of tax offenses.

Keywords*: tax offense, guilt, administrative liability.*

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Relevance of the study. Reforming tax legislation, which has significantly increased the size of sanctions for tax offenses, and introduced a new doctrinal concept - the fault of the taxpayer, requires the development and implementation of a clear, unified and understandable mechanism by which public authorities should establish the guilt of the taxpayer, and the taxpayer, in turn, will be able to defend himself against the charges.

In the absence of a definition of "guilt" and methods of establishing and proving it in the Tax Code of Ukraine, conditions may be created under which bona fide taxpayers will be prosecuted, while real offenders will be able to avoid liability due to imperfect legal techniques. The effective implementation by the state of the function of collecting taxes and fees to the state budget should be based on a clearly defined mechanism, which provides not only the range of responsibilities of taxpayers, but also the procedure for applying sanctions for their violation. Therefore, this issue is important and needs comprehensive research.

Also problematic and unresolved issue is the relationship between guilt and liability of officials of the legal entity and the legal entity itself, as well as the coexistence of administrative and financial liability for tax offenses, which should certainly be unified to improve the effectiveness of such liability.

Recent publications review. The issues of development of the conceptual and categorical apparatus of tax law of Ukraine were dealt with by such leading scientists as M. Kucheryavenko, V. Teremetsky, T. Kolomoets, O. Glukhyi, I. Getmantsev, R. Makarchuk, Ya. Tolkachev, T. Kravtsova, Z. Budko, A. Ivansky, S. Bondarenko and others.

However, given the ongoing process of reforming tax legislation, this issue needs further study, in particular in terms of normative definition of the concept of taxpayer guilt, methods of establishing and proving it.

The article's objective. The purpose is to consider the doctrinal concept of "wine" and the normative possibility of its application in tax legislation to bring the taxpayer to responsibility, as well as to develop proposals for normative and legal improvement of the definition of the taxpayer's guilt, methods of its establishment and proving to the extent necessary for bringing to justice.

Discussion. From 01.01.2021 the Tax Code of Ukraine contains a new definition of a tax violation: illegal, culpable (in cases provided directly by the Code) action (activity or inactivity) of the taxpayer (including persons equated with him/her), regulatory authorities and / or their executive officers (officials), other entities in cases provided directly by the Code [8].

Such changes were made by the Law of Ukraine "On Amendments to the Tax Code of Ukraine for the improvement of the tax administration, elimination of technical and logical inconsistencies in tax legislation" № 466-IX from 16.01.2020, which entered into force on 23.05.2020, which introduced the concept of holding a taxpayer liable for tax violation, provided that his/her guilt is proven [12].

Thus, the crucial difference of the new version of the definition of a tax violation contained in the Tax Code of Ukraine is the indication of the criterion of guilt of an action (activity or inactivity) of a taxpayer. That is, we can conclude that the legal responsibility for committing a tax offense occurs only in the presence of the guilt of the taxpayer.

However, Kobylnik D. draws attention to the fact that currently for the state and regulatory authorities the attitude of a person to the fact that such a person has violated the provisions of tax legal regulations (intentionally or negligently) is of no importance. This is due primarily to the fact that the main task for the state, as a subject of tax relations, is to fill the revenue side of the budgets at different levels [4].

Whereas, Khanova R. and Barikova A. note that even after all the changes, the Tax Code of Ukraine still does not contain a definition of "guilt". The guilt of a person in committing a tax offense is evidenced, if it is proved by the regulatory authorities, by the unreasonable, unscrupulous and inconsiderate activity, providing that the person is able to comply with the rules and regulations, for violation of which the Code provides liability, but he\she failures to take sufficient measures for the rules submitting. Due to the legislator's use of the conjunction "and" between the words "unreasonable, unscrupulous and inconsiderate", it is important to prove all the above-mentioned circumstances entirely, if the payer had the opportunity to behave properly. All these three criteria are evaluative concepts, the true content of which should be determined by the results of judicial interpretation [15].

Therefore, Litvintseva A .identifies the following features of a tax violation:

1) an action in the form of an activity or inactivity;

2) illegal feature;

3) the presence of a special subject;

4) illegal consequences of such an action;

5) the presence of responsibility for such actions [9, p. 123].

It should be noted that the doctrine of tax law fully recognizes the classical structure of the tax violation, which is analogous to criminal and administrative offenses, that is the body of the tax offense is formed by the object, the objective side, the subject, the subjective side.

The doctrine of tax law contains the following definition of the subjective side of the tax offense. It is the mental attitude of the subject of the tax violation to the socially dangerous action he commits, and its socially dangerous consequences at the time of the tax offense commitment.

We can summarize that with the presence of sufficiently complete and well-established definitions for the determination of the subjective side of the offense, the relevant normative act – the Tax Code of Ukraine does not contain a definition of guilt.

For the most part, scholars express ambiguous positions that, in fact, in the case of tax violations, we can only talk about the degree of activity and willingness of officials of taxpayers' organizations to take measures to prevent tax offenses. It is not possible to evaluate the activity of a legal entity from the point of view of intention or negligence [9, p. 125].

Thus, the most problematic issue both in determining the component of the tax offense and in the application of administrative liability for the tax violation is the concept of the subjective side of the tax offense. At present, guilt, as a component of a tax offense, still has neither a clearly determined definition nor the practice of proving it by both regulatory authorities and courts in tax disputes resolution.

We will make an attempt to determine for ourselves under what conditions legal liability for a tax offense can be applied.

Therefore, as if the Tax Code of Ukraine does not contain the concept of "guilt", it is possible in this case to appeal to the analogy of the law.

On July 17, 1997, Ukraine ratified the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention) [5]. According to Art. 9 of the Constitution of Ukraine, valid international treaties, the binding nature of which has been approved by the Verkhovna Rada (The Supreme Council) of Ukraine, are part of national legislation, i.e., the Convention is applicable in Ukraine as an integral part of national legislation [9].

In this case, in accordance with Part 1 of Art. 17 of the Law of Ukraine "On enforcement of judgments and application of the case law of the European Court of Human Rights" (hereinafter – ECtHR) [11], courts in the process of cases use the Convention and the case law of the Court as a source of law. That is, due regard for the case law of the European Court of Human Rights is a matter of ensuring the principle of the rule of law supremacy in Art. 8 of the Constitution of Ukraine. It should be noted that the European Court of Human Rights considers that the legal relations that have developed in the tax sphere are in many respects analogous to those in the field of criminal offenses.

hus, in 1976, in the case "Engel and Others v. The Netherlands" [14] the European Court of Human Rights (ECtHR) concluded that for the purposes of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), the notion of "criminal prosecution" has an autonomous meaning and is not limited to the qualification of "criminal" under the national law. The ECtHR has established its own criteria for defining the concept of "criminal prosecution", which have been called the 'Engel' criterion and are now widely used in the practice of the ECtHR. In fact, according to the 'Engel' criterion, a significant part of tax charges and fines in Ukraine is qualified as a criminal charge against the payer; as well as such sanctions are noticeable and more punitive (not aimed at compensating for the damage). Based on an analysis of the nature of tax penalties, the ECtHR concluded that since such fines are applied to an unlimited number of taxpayers (the second criterion) and are intended to penalize the taxpayer (partly the third criterion), tax penalties should be considered as "criminal" for the purposes of the Convention.

Therefore, in the case of determining of "guilt", it is possible to refer to the definitions contained in the Criminal Code of Ukraine in Articles 23-25 [7], and to the doctrine of criminal law. So, guilt is a person's mental attitude to his\her illegal activity or inactivity and its consequences in the form of intention or negligence. Guilt is one of the elements of the subjective side of any offense, and therefore legal liability is generally possible only if a person is guilty of a prohibited action. Liability without fault is possible only in certain cases provided

by law in civil law (for example, when causing damage by a source of increased danger). Forms of guilt are combinations of certain features of consciousness and will of a person committing a socially dangerous action specified in the criminal law.

According to Art. 23 of the Criminal Code of Ukraine, the guilt is a mental attitude of a person to an activity or inactivity provided by the Criminal Code, and its consequences, expressed in the form of intention or negligence. The interesting is the case law of the Supreme Court. Thus, in the resolution of 27.04.2018 in case № 820/4064/17 the court made the following legal conclusion: tax offenses within the meaning of paragraph 109.1 of Article 109 of the Tax Code of Ukraine are illegal actions (activity or inactivity) of taxpayers, tax agents, and / or their officials, as well as officials of regulatory authorities, which led to non-fulfillment or improper fulfillment of the requirements established by this Code and other legislation, the control over observance of which is entrusted to the regulatory authorities.

The court also points to signs of guilt of the legal entity: "the guilt of the legal entity in this case, according to the panel of judges, is proved by negligence of the payer's officials, which was expressed in the lack of control over the safety and validity of personal keys of taxpayer, that makes impossible the fulfillment of payer's duty for the registration of excise invoices in time" [10].

In paragraph 110 the judgment of 23 July 2002 in the case of Westberg Taxi Aktiebolag Company and Vulich against Sweden, the ECtHR stated that "… administrative courts dealing with applicants' complaints against tax administration decisions have full jurisdiction in these cases and the power to overturn contested decisions. Cases must be considered on the basis of the submitted evidence, and to prove the existence of grounds provided by the relevant laws for the imposition of tax fines is the tax administration" [13].

Therefore, it is the tax authority that is obliged to prove the existence of a tax offense, including the subjective attitude of the taxpayer to the committed tax violation (if it is committed), which is an irrevocable condition for bringing the taxpayer to the responsibility.

The fact what exactly should the tax authority be guided with in establishing the guilt of the taxpayer is not defined by law. Currently, the practice of bringing the taxpayer to both administrative and financial responsibility is well-established. According to Article 61 of the Constitution of Ukraine, no one can be twice brought to responsibility of the same type for the same offense [6]. However, Article 112 of the Tax Code of Ukraine stipulates that bringing taxpayers to financial responsibility for violating tax laws and other legislation, the control of which is entrusted to the supervisory authorities, does not release their officials if there are appropriate grounds for administrative or criminal liability.

Administrative liability of officials occurs only under certain conditions and in cases established by law. Discretionary powers of regulatory authorities in these cases are absent. From the above-mentioned facts, we can conclude that administrative sanctions are a measure of administrative influence through administrative law, which contain a conviction of the perpetrator and his\her action and which have negative consequences for the offender [8]. Financial responsibility for tax offenses is mostly imposed on the taxpayer and is established in accordance with the Tax Code of Ukraine, and is applied in the form of penalty (financial) sanctions (fines). The presence of guilt is a prerequisite for bringing a person to financial responsibility in the following tax offenses:

– paragraph 119.3 of the TCU (violation by the taxpayer of the procedure for submitting information about individuals – taxpayers);

– paragraphs 123.2 - 123.5 of the TCU (penalty sanctions in case of determination by the regulatory authorities of the amount of tax liability and / or other obligation, the control over payment of which is entrusted to the regulatory authorities, reduction of budget reimbursement or detection the facts of the use of tax benefits not for the intended purpose or contrary to the conditions or purposes of their provision);

– paragraphs 124.2 - 124.3 of the TCU (violation of the rules of payment of a monetary obligation);

– paragraphs 1251.2 – 1251.4 of the TCU) (violation of the rules of accrual, withholding and payment (transfer) of taxes to the sources of payment).

Therefore, it becomes necessary to define the concept of guilt of a legal entity. As it is mentioned above, guilt is a certain mental state of a person, his\her attitude to his\her behavior and its results. As the basis of responsibility, guilt makes sense only when it is possible to influence the motives of human behavior. Therefore, the guilt of a legal entity should be taken into account when establishing liability, if it is possible to identify the person or persons who,

acting as bodies, representatives or employees of the organization, violated or contributed to the violation of contract, caused property damage to other participants of civil case. It is often difficult or impossible to identify specific individuals whose activity or inactivity have violated the subjective rights of other participants. However, even if these persons are identified, they, as a general rule, do not bear pecuniary responsibility to the person who was harmed. They will be liable to the legal entity for violation of their official and labor duties. There is a kind of transformation of the responsibility of a legal entity into the responsibility of its officials and employees. This fact raises the question of the guilt of the individuals, but in a different way [3, p. 163]. Thus, it can be concluded that administrative liability arises only in the presence and proof of guilt of the taxpayer-individual or official of the legal entity. Financial liability for a tax offense arises on a set of conditions when it will be proved not only the guilt of the official – the taxpayer, but also in the presence of signs of unreasonableness, dishonesty and lack of due diligence.

Based on the above-mentioned facts, the author concludes that there is a need to introduce a mechanism of direct dependence of bringing the taxpayer to financial responsibility from the primary establishing by the court of guilt of an individual – taxpayer or legal entity to official to administrative liability for an administrative offense, as well as the need to classify tax offenses for those that require or do not require a form of ascertainment of guilt.

Conclusions. Based on a study of the specifics of proving guilt in committing a tax offense, we found out and suggested the following:

1) The primary outcome should be the result of consideration of the case of bringing an individual – a taxpayer or an official of a legal entity to administrative responsibility for committing an administrative offense.

2) The tax authority should obtain the function of a prosecution party by analogy with the activities of the prosecutor's office in criminal proceedings. Thus, the tax authority must collect the appropriate amount of evidences and present them to the court, which will assess them and make a conclusion about the subjective attitude of the person to the action.

3) The court's conclusion should be the basis for the next stage of liability of the taxpayer – his\her bringing to financial responsibility.

4) The tax offense must contain a reference to a specific form of guilt, taking into account the volitional factor. It should be considered that the standard of proof "out of a reasonable doubt" requires a significant amount of evidences to be collected by the tax authority.

5) It is rational to establish a more detailed classification of tax offenses with the possibility of prosecuting some of them without establishing the form of guilt of the taxpayer, defining in these cases the standard of proof is the "balance of probabilities" inherent in civil proceedings.

Conflict of Interest and other Ethics Statements

The author declares no conflict of interest.

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ОСОБЛИВОСТІ ДОВЕДЕННЯ ВИНИ У ВЧИНЕННІ ПОДАТКОВОГО ПРАВОПОРУШЕННЯ

Анотація. Стаття присвячена аналізу запровадженої у 2020-2021 роках концепції притягнення до відповідальності платника податків за податкові правопорушення за умови доведеності його вини та розробці на цій основі пропозицій щодо вдосконалення правових механізмів притягнення платників податків до відповідальності. Розглянуто проблемні питання відсутності законодавчого визначення поняття «вина» та методів її встановлення та доведення у Податковому кодексі України, а також проблему співвідношення вини та відповідальності посадових осіб юридичної особи та власне юридичної особи, а також співіснування адміністративної та фінансової відповідальності за вчинення податкових правопорушень. Запропоновано ряд заходів щодо нормативно-правового вдосконалення механізму встановлення та доведення вини платника податків, необхідного для притягнення їх до відповідальності шляхом наділення додатковими повноваження органів податкової служби.

Також автор звертає увагу на можливість запозичення норм кримінального права та процесу при розгляді справ про притягнення до адміністративної відповідальності за податкові правопорушення у частині зібрання доказів, представлення їх суду, надання їм оцінки, а також можливості захисту платника податків від пред'явлених звинувачень. Проаналізовано доцільність встановлення першочерговості судового розгляду справ про притягнення платників податків до адміністративної відповідальності, що має стати правовим підгрунтям для притягнення в подальшому до фінансової відповідальності, надання можливості пред'явлення регресних вимог, а також запропоновано застосовувати різні стандарти доказування до окремих видів податкових правопорушень. Автор також приділяє увагу можливості класифікації податкових правопорушень за принципом необхідності встановлення та доведення форми вини платника податків, акцентуючи увагу на необхідності дотримання балансу між значимістю порушення та його адмініструванням в процесі притягнення порушника до відповідальності.

Ключові слова: *податкове правопорушення, вина, адміністративна відповідальність.*